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| KENNETH T. TRUHLAR, Appellant |) | |
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| and |) | Docket No. 05-1500 |
| |) | Issued: January 12, 2006 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Westmont, IL, Employer |) | |
| |) | |

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

On May 9, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 12, 2004 regarding a forfeiture of compensation and resulting overpayment of compensation.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the forfeiture and overpayment issues.

The issues on appeal are: (1) whether appellant forfeited his compensation for the period March 2000 through June 2001 on the grounds that he knowingly failed to report earnings; (2) whether a resulting overpayment of \$10,594.25 in compensation occurred; and (3) whether appellant was at fault in the matter of the overpayment, precluding waiver.

¹ This is the date of the postmark of appellant's appeal to the Board.

FACTUAL HISTORY

On November 3, 1998 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim alleging that he sustained whiplash and low back pain as the result of a November 2, 1998 motor vehicle accident. The Office accepted his claim for cervical and thoracic strains on November 12, 1998. The Office informed appellant that if wage loss continued after continuation of pay expired he could claim disability compensation on Form CA-7. He was further advised to notify the Office immediately upon his return to work or improvement of his condition. Appellant returned to limited-duty work on November 4, 1998. He began working less than eight hours a day on November 12, 1998.

On CA-7 forms dated April 20, 2000 through May 11, 2001 appellant indicated that he did not engage in any salaried employment, commission, volunteer or self-employment. He requested compensation by filling in "no" or not providing any response. The question on each CA-7 form asked, "[h]ave you worked outside your federal job during the period(s) claimed in [s]ection 2? (Include salaried, self-employment, commissioned, volunteer, etc.)"

On May 18, 2001 appellant participated in a rehabilitation interview with a Postal Inspector. He reported during that interview that he played music and had a studio in his home. Appellant stated that he played bass guitar on the weekends and recorded music for other people occasionally. He stated that his business name was Sonic Crave.

Appellant completed a Form CA-7 on May 31, 2001 covering the period May 5 through 18, 2001. He stated:

"I have made money from my musician hobby in which I recently inc[orporated] namely Sonic Crave Music, Inc. This section was never explained to me, so perhaps you can give me specifics. I had a meeting with two ladies from the Great Lakes Injury Compensation, and one lady told me there's a line on Form CA-7 I should fill out. This is very unclear to me and I am overwhelmed with the compensation paperwork...."

He completed an additional Form CA-7 on June 12, 2001 requesting compensation from May 19 to June 1, 2001 and indicated that he had a "musical hobby."

The Office received an investigative report dated September 4, 2001 from the U.S. Postal Inspection Service, Northern Illinois Division. The report stated that while receiving compensation from the Office appellant was employed as a member of the music group, Bang, beginning in March 2000. Appellant stated that he played music on weekends and that he considered this to be a hobby. Ronald R. Rando, leader of Bang, stated that appellant joined the band on March 1, 2000 and that appellant received \$8,885.00 in 2000 and \$2,500.00 in 2001.

In a letter dated February 8, 2002, the Office made a preliminary finding of overpayment in the amount of \$10,594.25 on the grounds that appellant had forfeited his compensation benefits from March 2000 to June 2001. Appellant requested an oral hearing on March 1, 2002.

By decision dated January 17, 2003, the hearing representative remanded appellant's claim for a formal forfeiture decision and development of the medical evidence.²

By decision dated May 2, 2003, the Office found that appellant had forfeited his entitlement to compensation for the period March 2000 and June 2001 on the grounds that he failed to report earnings as required under section 8106(b) of the Federal Employees' Compensation Act.³ The Office found that appellant knowingly omitted his outside earnings on his CA-7 forms from March 2000 to June 2001 and forfeited all compensation for that period.

In a May 2, 2003 letter, the Office issued a preliminary determination that an overpayment had occurred in the amount of \$10,594.25 for the period March 2000 to June 2001 pursuant to section 8106 of the Act due to his failure to report his earnings from outside employment on numerous CA-7 forms. The Office found that appellant was not without fault in the creations of the overpayment. The Office informed appellant that, if he disagreed with the preliminary determination, he could, within 30 days, submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review.

On May 27, 2003 appellant requested an oral hearing before an Office representative on the issue of fault and eligibility for waiver of the overpayment.

At the oral hearing on January 21, 2004, appellant testified that he began playing in the band every weekend and that he had previously played in several bands both with and without compensation, that he had reported any earnings to the Internal Revenue Service, but did not consider this a job.

In a May 12, 2004 decision, the hearing representative affirmed the Office's decisions regarding forfeiture, overpayment and fault for the period of May 2000 through June 2001 in the amount of \$10,594.25. He concluded that his amount was due and payable.

LEGAL PRECEDENT

Section 8106(b) of the Act provides in pertinent part:

"The Secretary of Labor may require a partial disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the time the Secretary specifies.... An employee who--

- (1) fails to make an affidavit or report when required; or
- (2) knowingly omits or understates any part of his earnings;

² The Office has not issued a final adverse decision regarding any change in appellant's medical condition and the Board will not address this issue on appeal. 20 C.F.R. § 501.2(c).

³ 5 U.S.C. §§ 8101-8193, 8106(c).

forfeits his right to compensation with respect to any period for which the affidavit or report was required.”⁴

Appellant, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he “knowingly” failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.⁵ The term “knowingly” is defined in the regulations as “with knowledge, consciously, willfully or intentionally.”⁶

ANALYSIS

The Office found that appellant forfeited his right to compensation for the period March 2000 to June 2001 pursuant to section 8106(b)(2)⁷ on the basis that he knowingly failed to report his employment on Office CA-7 forms. The Office found that appellant made incorrect statement on his CA-7 forms because he either filled in “no” or did not provide any response prior to May 31, 2001.

However, the question presented to appellant on each of the CA-7 forms was phrased in the following manner: “[h]ave you worked outside your federal job during the period(s) claimed in [s]ection 2? (Include salaried, self-employment, commissioned, volunteer, etc.)” As noted above, appellant either filled in “no” or did not provide any response prior to May 31, 2001. The question presented to appellant did not inquire as to his “earnings.” As noted above, section 8106(b)(2) requires that there be a knowing omission or understatement of earnings. The Board has previously held that the language of some versions of the Form CA-7 is not specific enough to reasonably put an injured employee on notice that he had to report all earnings, no matter the source, for the period of claimed compensation.⁸ The Board finds that the language in the CA-7 forms of record did not reasonably put appellant on notice that he had to report all earnings, no matter the source. The forms in question did not indicate that appellant had to report all earnings, but merely requested general employment information. Consequently, the Board finds that the forms of record were insufficient to put appellant reasonably on notice of his responsibility to report “earnings.” The Office did not meet its burden of proof to establish that he forfeited his right to compensation for the periods claimed. As appellant was not specifically requested to provide any earnings information, he cannot be found to have knowingly omitted or understated such information so as to require invoking the penalty provision of forfeiture under section 8106(b)(2).⁹ The Office improperly concluded that appellant forfeited his compensation for the period March 2000 to June 2001.

⁴ 5 U.S.C. § 8106(b).

⁵ *Anthony A. Nobile*, 44 ECAB 268, 271-72 (1992).

⁶ 20 C.F.R. § 10.5(n).

⁷ 5 U.S.C. § 8106(b)(2).

⁸ *Karen Spurling*, 56 ECAB ____ (Docket No. 04-1233, issued December 16, 2004).

⁹ *See Christine P. Burgess*, 43 ECAB 449, 458 (1992).

Because the Board finds that there was no forfeiture of compensation for the period March 2000 to June 2001, the Board also finds that the Office erred in determining that an overpayment of compensation was created as a result of forfeiture. Consequently, it is not necessary for the Board to further address the overpayment issues.

CONCLUSION

In this case, the Board finds that the Office failed to meet its burden of proof to establish that appellant forfeited his right to compensation or that he received an overpayment resulting from any forfeited compensation.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 12, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board